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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

BRUCE L. SHAW

Defendant and Appellant.

A124252

(Alameda County Super. Ct. No. C155964)

Defendant was convicted following a jury trial of murder (Pen. Code, § 187, subd. (a)),¹ with enhancements for personal and intentional use of a firearm causing great bodily injury (§§ 12022.53, subd. (d), 12022.7, subd. (a)). He was sentenced to a state prison term of 50 years to life. In this appeal he claims that the trial court improperly declined to approve his proposed voir dire questions, and gave an erroneous instruction on provocation in response to a question from the jury. We conclude that the court did not abuse its discretion by restricting defendant's voir dire questions, and responded correctly to the jury's inquiry on provocation. We therefore affirm the judgment.

STATEMENT OF FACTS

Defendant acknowledged that he shot and killed the victim, Sirron Croskey, early on the morning on April 5, 2006. The crucial issue at trial was the extent, if any, to

¹ All further statutory references are to the Penal Code.

which the killing was mitigated by defendant's mental state and the events that preceded the shooting.²

About 7:00 on the evening of April 4, 2006, Croskey left his girlfriend Yvette Whiten in their burgundy van, ostensibly to record some music. He was wearing tan Timberland pants, boots, and a fatigue jacket. Croskey called Whiten at 4:21 the next morning to tell her he was "with some friends" and "was trying to get home and that he loved" her. He "seemed happy" to Whiten, but also sounded as though he had been drinking. Whiten never heard from Croskey again.

Somehow, Croskey joined a friend Larry Stewart and defendant that evening, and together they appeared unexpectedly around 2:00 the next morning at a residence on Phippen Street in Oakland occupied by Taresa Griffin and Aggie Modica, among others.³ Croskey, Stewart and defendant sat on the couch in the living room of the house, drank alcohol and smoked "Black and Mild" tobacco. They also had some marijuana with them and "smelled like they had been smoking weed." They appeared to be "high," but Griffin and Modica did not notice any overt indications of animosity between them. After about 15 minutes, they left in a burgundy van. Defendant did not appear to be drunk and was "able to walk straight" when he left the house.

Croskey's body was discovered around 5:45 the evening of April 6, 2006, slumped in the front seat of a white car parked behind an apartment complex at 115 Catron Drive in Oakland. Blood was visible on the seat of the car and the victim's shoulder. A nine-millimeter shell casing was found on the front passenger seat. Croskey suffered an "entrance-type gunshot wound" in front of the right ear, and an "exit-type" wound to the left side of his face. "Stippling," or powder burning, was detected on the victim's skin,

² Therefore, our recitation of the facts need not dwell on evidence that proves the identity of the shooter, and will instead focus on the evidence pertinent to defendant's intent and mental state.

³ At the time Griffin was Stewart's girlfriend, of sorts; Modica is Griffin's cousin. The others who lived at the house were Griffin's aunt and her three children.

which indicated that the shot was fired from close range. Elevated levels of alcohol, methamphetamine and ecstasy were found in his blood.

The investigation of Croskey's murder led Sergeant Tony Jones of the Oakland Police Department first to Griffin and Modica, and from there ultimately to Stewart. Jones then interviewed Stewart at the Oakland Police Department on the morning of October 11, 2006. Stewart initially denied that he was present when the shooting of Croskey occurred, but eventually admitted he "was there when it happened," and told Jones that "Bruce was the person that shot and killed" Croskey. Further investigation by Jones identified defendant as the man Stewart referred to as "Bruce."

Defendant was transported to the Oakland Police Department and interviewed by Sergeant Jones on the afternoon and evening of October 12, 2006. Stewart was placed in a separate interview room next door. Defendant was briefly taken to see Stewart and informed that Stewart had told the officers "what happened." Defendant then offered his version of the shooting of Croskey during several interviews.

According to defendant, on the night of the shooting he was walking on 90th and Bancroft when he encountered Stewart riding in the front passenger seat of a red van driven by Croskey. Defendant had been friends with Stewart for years, but had never met Croskey. Defendant accepted their offer to ride with them. They "rode around for a while," and eventually drove to a house on Pippin Street, where Stewart's girlfriend lived. Defendant and Croskey were left in the van while Stewart alone went inside the residence on Pippin Street. Croskey jumped into the back seat of the van, and after some brief conversation touched defendant on "his rear-end" and leg in a "way that a woman would touch a guy." Defendant "was offended by it," and told him to stop. When defendant then began to leave the vehicle, Croskey "grabbed his rear-end and tried to pull him back into the van." Defendant again yelled at Croskey to stop and angrily got out of the van. Croskey "snickered" and tried "to make a joke out of it," then left the van and went to the front door of the house.

Inside the house, defendant told Stewart "what had occurred inside the van." Stewart replied that "the victim had touched him, too." Defendant also said that Stewart

gave him a Glock nine-millimeter gun as they left the residence or after they returned to the van. Defendant told Stewart that Croskey “had to go,” meaning defendant was “going to kill him.” Stewart agreed that Croskey “gotta go.”

From Pippin Street they drove around “looking for some rims,” and ended up on Catron Drive, where Croskey saw a white car “that had some rims on it” behind a building. After Croskey got into the passenger seat of the white car, defendant “shot him” through the open door. Defendant said Stewart gave him “the nod,” after which he “just pointed” the gun at Croskey “and he fired.” After the shot was fired, defendant and Stewart immediately ran from the car to Croskey’s van and drove away. They “ultimately ended up in Sacramento,” where they were chased by police officers and ran from the van.

Defendant then explained a childhood incident to Sergeant Jones during which, at age three, he was forced to engage in oral copulation by a friend of the family. Defendant did not remember any details of the molestation, but Croskey’s act of touching him “took him back to his childhood.” He explained to Sergeant Jones that he shot Croskey “off anger” because “you don’t let another man put his hands on you without doing nothing.” Defendant said: “I was just gettin’ frustration out with somebody puttin’ their hands on me.” He did not know he was going to shoot Croskey until the victim “got in the car.” He claimed that he aimed at Croskey’s chest, and “didn’t care” where he hit the victim as long as “it was gonna go somewhere into his body.” Defendant stated he did not even know Croskey had died until he was questioned.

Stewart was also interviewed again with defendant by Sergeant Jones, and essentially reaffirmed defendant’s version of the events. Stewart added that they were all “high” as they drove around Oakland after they left the Pippin Street residence. Croskey was in a very emotional state after taking ecstasy pills.

The defense presented expert testimony from Dr. Jules Burstein, a clinical and forensic psychologist who qualified as an expert in the field of “homosexual panic,” a subset of panic disorder which consists of an acute anxiety or anger response to a homosexual advance or “touching incident.” Homosexual panic may have two causes: a

disturbing feeling that the one who is touching the person views him “as a homosexual,” and prior sexual abuse as a child, which triggers “traumatic reminders” of helplessness and humiliation when a man is “touched in a sexual way by a man.” To conduct a psychological evaluation of defendant, Dr. Burstein interviewed him extensively in November of 2008, and conducted psychological tests. Defendant described for Dr. Burstein the incident that culminated in the shooting of Croskey. Dr. Burstein also examined defendant’s medical records, which indicated that he had “been forced to orally copulate the penis of an older teenager when he was three years old.” Defendant disclosed “further examples of homosexual panic” to Dr. Burstein: first, that a staff person at the Seneca Center “grabbed him in the genital area” while attempting to restrain him; and subsequently, that he thought a staff person in another facility “fondled his genitals while he was asleep.” Dr. Burstein did not know if these acts as perceived by defendant actually “happened or not,” but in any event they were “tremendously overloading and produced extraordinary anxiety” to him. Dr. Burstein also learned that defendant was physically abused and neglected as a child.

Following his examination of defendant Dr. Burstein concluded that he suffers from a learning disorder, attention deficit hyperactivity disorder, posttraumatic stress disorder, depressive disorder, and has borderline intellectual functioning. He also has poor social judgment and lacks capacity to properly understand or evaluate others. In his relationships with others defendant is distrustful, resentful, oversensitive, paranoid, and narcissistic. When presented with a “hypothetical” corresponding to the events that resulted in the shooting of Croskey, Dr. Burstein offered the opinion that defendant’s conduct was “consistent with homosexual panic.” Defendant’s perception of events and ability to respond rationally were further impaired by his ingestion of alcohol and drugs on the night of the shooting. Defendant’s actions were “compatible” with someone who felt he could not “take the level of anxiety and rage and shame” that was produced by “this persistent pattern of sexual touching.” Dr. Burstein agreed that an “average person” who is “not homophobic” would not have reacted in the same way.

DISCUSSION

I. The Restrictions Placed on Voir Dire.

Defendant complains of the trial court's refusal to allow him to question prospective jurors about their receptiveness to his homosexual panic defense. Proposed voir dire questions were submitted to the court which referred to the intent of the defense to present expert testimony that the "primary psychological factor leading to the shooting" was "homosexual panic" experienced by defendant, and asked jurors if they would impartially accept the forensic psychologist's testimony on the subject of homosexual panic.⁴ The court ruled that the defense could generally describe the testimony of a forensic psychologist and ask jurors if they were "inclined not to believe" expert testimony, but was foreclosed from presenting the remaining proposed voir dire inquiries that referred to "the facts of this case." Besides reviewing and limiting certain proposed voir dire questions drafted by defense counsel, the trial court permitted both parties to pose additional questions of the panel during the selection process. Defense counsel elected to refrain from asking any questions regarding particular jurors' inclinations to believe or disbelieve forensic psychologist testimony. Instead, counsel focused on general notions of juror impartiality, the issue of murder, the burden of proof, and the presumption of innocence. Defendant claims that by so limiting the defense voir dire inquiry into the "topic of homosexual panic during jury selection" to uncover potential juror bias and grounds for "a challenge for cause," the court "committed error of federal Constitutional dimension" which infringed on "his Sixth Amendment right to jury trial and his Fourteenth Amendment right to due process of law."

"The right to exercise peremptory challenges 'has always been held essential to the fairness of trial by jury.' [Citation.] It 'is one of the most important of the rights

⁴ The notion of "homosexual panic" as explained by the defense expert Burstein was not a simple one to describe even for the expert. It consumed several pages of narrative when presented during the trial. When the parties discussed the scope of this topic before voir dire began, the trial court stated it would be very difficult for laypeople to adequately explain the notion to the jurors.

secured to the accused. . . .’ [Citations.]” (*People v. Armendariz* (1984) 37 Cal.3d 573, 583.) “Because the peremptory challenge is a critical safeguard of the right to a fair trial before an impartial jury (see *Swain v. Alabama* (1965) 380 U.S. 202, 219–221 [13 L.Ed.2d 759, 771–773, 85 S.Ct. 824]; *Pointer v. United States* (1894) 151 U.S. 396, 408 [38 L.Ed. 208, 213–214, 14 S.Ct. 410]), questions directed at its intelligent exercise manifestly fall within the bounds of the ‘reasonable inquiry’ to which counsel are entitled.” (*People v. Williams* (1981) 29 Cal.3d 392, 405.) Based upon enumerated federal constitutional principles the California Supreme Court has declared that “ ‘if [the constitutional right to an impartial jury] is not to be an empty one, the defendants must, upon request, be permitted sufficient inquiry into the background and attitudes of the jurors to enable them to exercise intelligently their peremptory challenges.’ [Citations.]” (*Id.* at pp. 405–406.) Therefore, “counsel should be allowed to ask questions reasonably designed to assist in the intelligent exercise of peremptory challenges whether or not such questions are also likely to uncover grounds sufficient to sustain a challenge for cause.” (*Id.* at p. 407.)

Nevertheless, left intact is the considerable discretion and duty of the trial court “to restrict voir dire within reasonable bounds to expedite the trial.” (*People v. Avila* (2006) 38 Cal.4th 491, 536; see also *Ham v. South Carolina* (1973) 409 U.S. 524, 528; *People v. Zambrano* (2007) 41 Cal.4th 1082, 1120; *People v. Williams, supra*, 29 Cal.3d 392, 407–408.) The exercise of discretion by trial judges in conducting voir dire is accorded considerable deference by appellate courts, and is reviewed for abuse of discretion. (*People v. Jenkins* (2000) 22 Cal.4th 900, 990; *People v. Taylor* (1992) 5 Cal.App.4th 1299, 1313.)

Moreover, the rule has often been “reaffirm[ed] that it is not ‘a function of the examination of prospective jurors to educate the jury panel to the particular facts of the case, to compel the jurors to commit themselves to vote a particular way, to prejudice the jury for or against a particular party, to argue the case, to indoctrinate the jury, or to instruct the jury in matters of law.’ [Citation.] Therefore, a question may be excluded if it appears to be intended solely to accomplish such improper purpose.” (*People v.*

Williams, supra, 29 Cal.3d 392, 408, fn. omitted; see also *People v. Carter* (2005) 36 Cal.4th 1114, 1178; *People v. Cash* (2002) 28 Cal.4th 703, 721–722.) The law is “clear that ‘[i]t is not a proper object of voir dire to obtain a juror’s advisory opinion based upon a preview of the evidence’ [Citation.]” (*People v. Butler* (2009) 46 Cal.4th 847, 860.)

Rather, the proper inquiry must be “ ‘ “directed to whether, without knowing the specifics of the case, the juror has an ‘open mind’ ” ’ ” on the issues presented. (*People v. Butler, supra*, 46 Cal.4th 847, 859, citation omitted; see also *People v. Clark* (1990) 50 Cal.3d 583, 597.) Thus, while either party is entitled to ask prospective jurors questions that are specific enough to determine if those jurors harbor bias that would cause them not to follow an instruction on the issues presented in the case, an inquiry must not be so specific that it requires prospective jurors to prejudge an issue based on a summary of the evidence likely to be presented. (See *People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 47; *People v. Burgener* (2003) 29 Cal.4th 833, 865; *People v. Cash, supra*, 28 Cal.4th 703, 721–722; *People v. Sanders* (1995) 11 Cal.4th 475, 538–539.)

We find no abuse of discretion in the restrictions on voir dire imposed by the trial court in the case before us. The court did not categorically prohibit inquiry into the subject of the testimony of a forensic psychologist. The court properly permitted the defense to ask questions that generally examined prospective jurors’ views on expert opinion testimony. The additional inquiries foreclosed by the court were impermissibly directed by the defense at the anticipated testimony of the defense expert based on the specific facts of the case: an explanation of the homosexual panic condition suffered by defendant, and a description of the reasons defendant “was experiencing that at the time of the shooting.” The court did not err by refusing to permit counsel to ask questions that recited and explored a consideration of the particular evidence expected to come before the jury related to a shooting committed by defendant under the influence of homosexual panic. (See *People v. Coffman and Marlow, supra*, 34 Cal.4th 1, 47; *People v. Rogers* (2009) 46 Cal.4th 1136, 1152; *People v. Jenkins, supra*, 22 Cal.4th 900, 991.) A “defendant cannot insist upon questions that are ‘ “so specific” ’ that they expose jurors

to the facts of the case [Citations.]” (*People v. Carasi* (2008) 44 Cal.4th 1263, 1286.)

II. The Supplemental Instruction on Voluntary Manslaughter.

Defendant also argues that the trial court provided an inadequate and erroneous response to an inquiry from the jury seeking guidance on provocation. The primary theory relied on by the defense was that the killing of Croskey was mitigated from murder to voluntary manslaughter by the victim’s apparent homosexual advances and defendant’s resulting “homosexual panic.” In support of the theory that defendant committed the shooting under provocation and thus without malice, the defense presented evidence of a prior act of molestation he suffered and expert opinion testimony from Dr. Burstein on the effect of the experience upon him. Defense counsel argued that the molestation endured by defendant as a child should be considered by the jury as a life experience that negated malice and reduced the crime to voluntary manslaughter. The prosecution countered that defendant’s “background” and “the fact that he was molested” were not relevant considerations in determining whether he responded as a “reasonable person” to the victim’s acts of provocation.

The trial court gave standard instructions to the jury on voluntary manslaughter and provocation due to sudden quarrel or heat of passion that may reduce the culpability for a killing from murder to voluntary manslaughter (CALCRIM Nos. 522 and 570). During deliberations, the jury sent a two-pronged question to the court seeking “guidance” on the issue of provocation: “1. In deciding weight and significance, can the jury consider earlier experiences of the defendant (not just acts committed within minutes or hours of the crime) in the decision. [¶] 2. Is there any interpretation/requirement analogous to manslaughter’s ‘ordinary person of average disposition’ or can provocation be considered when the defendant’s actions do not fall within the scope of what an ‘ordinary person . . .’ would do?” After discussion with counsel, the court declined to advise the jury that defendant’s “earlier experiences” could be considered in determining if defendant had been provoked. Instead, the court repeated the standard “522 and 570” provocation instructions to the jury, and to those added: “Now, if your verdict is murder,

you may consider the defendant's earlier experiences in affixing degree of murder at first or second degree. However, you may not consider the defendant's earlier experiences in deciding whether he acted as an ordinary person of average disposition, which would reduce a murder to manslaughter."

Defendant argues that the trial court's instructional response "was incorrect" and "improperly restricted the jury's consideration of favorable defense evidence that could have led to a verdict of manslaughter." Defendant's position is that his "prior experiences and background" were "relevant to the 'subjective' question of whether he . . . truly was provoked to a heat of passion at the time of the shooting," and "to the 'objective' question of whether 'an ordinary person of average disposition' would have been provoked to the same degree." He claims that the trial court's supplemental instruction erroneously directed the jury "not to consider material evidence favorable to the defense," and requires reversal of the murder conviction.

We proceed by delineating the rule that when the jury sent out its question, the court was presented with the statutory obligation "to provide the jury with information the jury desires on points of law." (*People v. Smithey* (1999) 20 Cal.4th 936, 985; see also *People v. Waidla* (2000) 22 Cal.4th 690, 746.) Under Penal Code "section 1138 the court must attempt 'to clear up any instructional confusion expressed by the jury.' [Citation.]" (*People v. Giardino* (2000) 82 Cal.App.4th 454, 465.) "This means the trial 'court has a primary duty to help the jury understand the legal principles it is asked to apply. [Citation.] This does not mean the court must always elaborate on the standard instructions. Where the original instructions are themselves full and complete, the *court has discretion* under section 1138 to determine what additional explanations are sufficient to satisfy the jury's request for information. . . .' [Citation.]" (*People v. Solis* (2001) 90 Cal.App.4th 1002, 1015, italics added; see also *People v. Smithey, supra*, at p. 985; *People v. Davis* (1995) 10 Cal.4th 463, 522.)

We must also look to the content of the trial court's charge to determine the propriety of the instructions. "In considering a claim of instructional error we must first ascertain what the relevant law provides, and then determine what meaning the

instruction given conveys. The test is whether there is a reasonable likelihood that the jury understood the instruction in a manner that violated the defendant's rights." (*People v. Andrade* (2000) 85 Cal.App.4th 579, 585; see also *Sandstrom v. Montana* (1979) 442 U.S. 510, 514; *People v. Warren* (1988) 45 Cal.3d 471, 487; *People v. Smith* (1992) 9 Cal.App.4th 196, 201.) "A court is required to instruct the jury on the points of law applicable to the case, and no particular form is required as long as the instructions are complete and correctly state the law." (*People v. Andrade, supra*, at p. 585.) "When a claim is made that instructions are deficient, we must determine whether their meaning was objectionable as communicated to the jury. If the meaning of instructions as communicated to the jury was unobjectionable, the instructions cannot be deemed erroneous." (*People v. Dieguez* (2001) 89 Cal.App.4th 266, 276; see also *Estelle v. McGuire* (1991) 502 U.S. 62, 70–75; *People v. Kelly* (1992) 1 Cal.4th 495, 525–526; *People v. Fonseca* (2003) 105 Cal.App.4th 543, 549.)

We thus examine the instructions to determine if they correctly conveyed to the jury the law of voluntary manslaughter based on provocation and heat of passion. (See *People v. Kelly, supra*, 1 Cal.4th 495, 525; *People v. Jenkins* (1994) 29 Cal.App.4th 287, 297.) Heat of passion is a theory of " 'partial exculpation' that reduce[s] murder to manslaughter by negating the element of malice." (*People v. Moye* (2009) 47 Cal.4th 537, 549.) "Voluntary manslaughter is the unlawful killing of another person without malice 'upon a sudden quarrel or heat of passion.' [Citations.] Under that theory, an unlawful killing is voluntary manslaughter " "if the killer's reason was actually obscured as the result of a strong passion aroused by a 'provocation' sufficient to cause an " "ordinary [person] of average disposition . . . to act rashly or without due deliberation and reflection, and from this passion rather than judgment." ' ' ' [Citation.]' [Citation.]" (*People v. Le* (2007) 158 Cal.App.4th 516, 527; see also *People v. Parras* (2007) 152 Cal.App.4th 219, 223.) "The essence of the sudden quarrel/heat of passion voluntary manslaughter is that the killer is so provoked by acts of the victim that he strikes out in the heat of passion, an emotion that obliterates reason that would prevail in the mind of a reasonable person. That circumstance negates malice aforethought, and reduces the

crime from second degree murder, which otherwise would be its classification.” (*People v. Johnston* (2003) 113 Cal.App.4th 1299, 1311.)

“Thus, ‘[t]he heat of passion requirement for manslaughter has both an objective and a subjective component. [Citation.] The defendant must actually, subjectively, kill under the heat of passion. [Citation.] But the circumstances giving rise to the heat of passion are also viewed objectively.” (*People v. Manriquez* (2005) 37 Cal.4th 547, 584; see also *People v. Avila* (2009) 46 Cal.4th 680, 705; *People v. Carasi, supra*, 44 Cal.4th 1263, 1306.)

While we think the trial court would have been better advised to limit the response to a re-reading of the standard voluntary manslaughter and provocation instructions, we find nothing in the supplemental instruction that was an incorrect statement of law.⁵ The jury sought guidance on “provocation,” specifically whether defendant’s “earlier experiences” could be considered to determine if his actions were those of an “ordinary person.” The trial court properly declined to instruct the jury, as the defense proposed, that the prior molestation and its impact on defendant’s psychological state was evidence pertinent to the provocation component of voluntary manslaughter. Even if we assume that defendant actually killed Croskey in a heat of passion⁶ – the subjective component of the manslaughter test – his earlier experiences and individual sensitivity to a perceived homosexual advance had no bearing on the provocation element which was the subject of the jury inquiry. Heat of passion “must be aroused by sufficient provocation judged objectively.” (*People v. Oropeza* (2007) 151 Cal.App.4th 73, 82.) “ ‘ “[H]eat of passion must be such a passion as would naturally be aroused in the mind of an ordinarily reasonable person under the given facts and circumstances,” because “no defendant may

⁵ We have often cautioned the trial courts against departing from standard jury instructions when responding to jury questions, and we do so again.

⁶ We observe that a great deal of time passed between the touching of defendant by the victim and the shooting, and the desire for revenge which defendant expressed in his statements to the police does not qualify as a passion that will reduce a killing from murder to manslaughter. (See *People v. Fenenbock* (1996) 46 Cal.App.4th 1688, 1704.)

set up his own standard of conduct and justify or excuse himself because in fact his passions were aroused, unless further the jury believe that the facts and circumstances were sufficient to arouse the passions of the ordinarily reasonable man.” [Citation.]’ [Citation.]” (*Id.* at pp. 82–83; see also *People v. Kanawyer* (2003) 113 Cal.App.4th 1233, 1244.) “Because the test of sufficient provocation is an objective one based on a reasonable person standard, the fact the defendant is intoxicated or suffers from a mental abnormality or has particular susceptibilities to events is irrelevant in determining whether the claimed provocation was sufficient.” (*Oropeza, supra*, at p. 83.) “‘[E]vidence of defendant’s extraordinary character and environmental deficiencies was manifestly irrelevant to the inquiry.’ [Citation.]” (*People v. Steele* (2002) 27 Cal.4th 1230, 1253.)

The trial court properly instructed the jury that defendant’s earlier experiences were pertinent to the issue of the degree of murder – that is, whether he premeditated and deliberated the killing. (*People v. Rogers* (2006) 39 Cal.4th 826, 878.) The remainder of the court’s response did not advise the jury to ignore defendant’s experiences and mental state to determine if he *subjectively acted in a heat of passion*, but only told the jury, “you may not consider the defendant’s earlier experiences in deciding *whether he acted as an ordinary person of average disposition*, which would reduce a murder to manslaughter.” (Italics added.) The statement of law was correct. We realize that the court’s supplemental instruction did not specifically mention defendant’s earlier experiences as related to the subjective heat of passion element. However, the jury question focused on the use of the “analogous” ordinary person standard of manslaughter in assessing defendant’s earlier experiences and provocation as related to *murder*. Further, the standard instructions repeated by the court advised the jury on the subjective heat of passion element of manslaughter. We conclude that no instructional error was committed.

Accordingly, the judgment is affirmed.

Dondero, J.

We concur:

Margulies, Acting P. J.

Banke, J.